CLAREMONT JOURNAL
OF LAW AND PUBLIC POLICY

Letter from the Editor-In-Chief

Dear Readers,

Welcome to the second print edition of the Claremont Journal of Law and Public Policy. Volume Two, Number Two includes thought-provoking articles on the medical ethics of punitive executions, Ellen Pao's recent case against Kleiner Perkins, and secret national security courts. It also includes an interview with Noah Feldman, Harvard Law professor and constitutional law scholar.

I'd like to once again extend thanks to those who give the Journal their time, effort, and talent. The writers who made this edition possible, Peter Ianelli, Brandon Granaada, and Will Springer, are fantastically talented and each provided invaluable starting points for the intellectual discourse we hope to provoke. Our Senior Editors also make invaluable contributions behind the scenes. The aforementioned Byron Cohen, Brandon Granaada, Jessica Laird, Michelle Goodwin, Sofi Cullen, and Madeline Stein all did excellent work editing our writers' content. Christina Coffin, formerly a Business Director, is now our Interview Coorespondent. She has conducted a number of fascinating interviews, which can be found on our website. Martin Sicilian, our Chief Operations Officer, has rounded out his final semester as COO (more on this later) with outstanding effort and has left the journal in a far stronger position moving forward. Once again, without him, this print issue would have been impossible. Our Webmaster and Publisher, Jessica Azerad, has spearheaded an excellent redesign of our website (5clpp.com) and played an integral role in getting this issue to print. During our executive board meetings, we often joke about firing her, but I can assure all of our readers that she is utterly irreplaceable. I'd like to thank our Business, Recruiting and Marketing Directors, Bailey Yellen along with Nicky Blumm, Julie Kim, and Alexander Reeser. Further thanks goes to the Salvatori Center for its financial backing.

I'd also like to mention that this will be my final edition of the Claremont Journal of Law and Public Policy as Editor-in-Chief. As I prepare to graduate, I'm passing off my position to the more-than-capable Martin Sicilian, who formerly served as Chief Operations Officer. Taking Martin's place as COO will be the similarly capable Alexander Reeser.

On a final note, I'd like to extend an invitation to students of all 5Cs to get involved our publication. The Journal of Law and Public Policy is always seeking new contributors and editors, as well as any 5C student with innovative ideas. If you have something to say about an issue of public or legal importance or feel that you could be a valuable addition to our staff in another way, please email info.5clpp@gmail.com with a brief proposal.

With Regards,
Henry Appel
Editor-in-Chief
Claremont Journal of Law & Public Policy

Table of Contents

The Executive Board

Pao v. Kleiner Perkins: When a Loss is Still a Win

By: Brandon Granaada, CMC '17

In the immediate aftermath of Ellen Pao's lawsuit against her former employer, Kleiner Perkins Caufield & Byers (Kleiner Perkins), many commentators are referring to her landmark gender discrimination case as a confirmation of the bias that exists at Silicon Valley venture capital firms and the tech companies they back. Pao's camp painted a picture of open sexual harassment and gender discrimination akin to a scene out of Mad Men. While this might seem to be an exaggeration on its face, it raises serious questions about the often unconscious bias surrounding gender roles in the workplace. The jury's decision to rule in favor of Ms. Pao's former employer on all four claims, however, should not be construed as support for gender discrimination. Rather, it examined the facts of a specific case and ruled that intentional discrimination could not be proven. Notwithstanding the ruling, the case has brought attention to the issue of gender discrimination in Silicon Valley and has challenged firms to be more conscious of their employment practices. Ellen Pao, despite the negative outcome, shined a light on subtle sexism, challenging firms to acknowledge and abolish it, which can be considered far more of a win than the $16 million she would have received had the jury found in her favor.

To provide context, it is worth examining the background and facts of the case. Ellen Pao, after receiving her BS from Princeton and her MBA and JD from Harvard, began working at Kleiner Perkins in 2005 as the chief staffer for John Doerr, a senior partner at the firm. In 2007 she was promoted to junior partner, a role she held for five years before being fired in 2012. Pao believed her lack of subsequent promotion and firing were the result of gender discrimination. She sued Kleiner Perkins, alleging that it violated the California Fair Employment and Housing Act by (i) failing to promote her because of her gender, (ii) retaliating against her for complaining about gender discrimination, (iii) failing to take reasonable steps to prevent said discrimination, and (iv) firing her when she complained.

Pao's case centered on her depiction of Kleiner Perkins as a "boy's club" which excluded women and propagated gender role stereotypes. As evidence, Pao's lawyers pointed to all-male ski trips and dinners with

Al Gore from which female employees were excluded, as well as workplace discussions about pornography. Pao argued this was evidence of gender discrimination in the workplace and that such discrimination contributed to her not being promoted. She refuted her employer's assertion that her failure to rise in the firm was due to poor performance, arguing she had received contradictory evaluations and was criticized for behaviors valued in men such as "aggressiveness."

Kleiner Perkins vehemently attempted to refute all four of Pao's accusations. It argued that Kleiner Perkins was a far better place to work for women than the industry's norm. The firm supported this argument by asserting that twenty percent of Kleiner Perkins' partners are female, while the industry average is between seven and eleven percent. Mary Meeker, a famed venture capitalist and Kleiner Perkins' most senior woman, testified that Pao's examples of gender discrimination were false, stating she had been invited to the ski trip and that Pao and another female attended a second dinner with Al Gore. She even called Kleiner Perkins "the best place to be a woman" in venture capital. Instead, Kleiner Perkins attributed Pao's firing to the nature of the role, her poor investing track record, and her shortcomings as a teammate.

In the end, the jury composed of six men and six women found in favor of Kleiner Perkins on all four claims. While the court determined Pao's suit was unfounded, it does not mean gender equality exists in the workplace— especially in Silicon Valley. A 2014 Babson College study found that only six percent of partners at 139 venture capital firms are female, down four percent from 1999. And a U.S. Census Bureau report, published in September 2013, indicated the number of women in computer jobs has also declined since the 1990s, with only 22 percent of software developer jobs now filled by women. As a high-profile plaintiff suing a high-profile defendant, with both parties well known in the venture capital and technology industries, Pao brought attention to the issues women face in Silicon Valley and amplified concerns over a lack of gender equality.

Deborah Rhode, a law professor at Stanford University, echoed this sentiment when she stated: "this case sends a powerful signal to Silicon Valley in general and the venture capital industry in particular. Defendants who win in court sometimes lose in the world outside it." While I agree with Rhode that the case should help change bias in hiring and employment practices by bringing attention to the issue of discrimination, I would hardly consider it a loss for Kleiner Perkins, technology companies or venture capital firms. Nondiscriminatory hiring practices and a better workplace environment will benefit everyone – having more engaged employees doesn't just increase job satisfaction, it can add to productivity as well.

In the aftermath of Pao's suit, other gender discrimination lawsuits have been filed against Silicon Valley employers. Chia Hong, a former Facebook employee, has sued the company, alleging gender discrimination, sexual harassment, and racial discrimination. Tina Huang, an ex-Twitter employee, has filed a lawsuit alleging sexually discriminatory promotion practices. Huang's lawsuit has the potential to have the greatest impact because she is seeking class-action status for her case.

In a time of innovation and progress, gender equality in the workplace has not caught up. Google, Apple, and Facebook are still nearly 70% male, and too few women and minorities enter the STEM field. The aforementioned U.S. Census publication authored by Liana Christin Landivar indicates, "Even among science and engineering graduates, men were employed in a STEM occupation at twice the rate of women." An unconscious bias against gender equality exists and we must recognize and resolve it.

In the last year, the role of women in Silicon Valley has become a more common topic of discussion, something I don't believe would have happened without a plaintiff as recognizable as the now interim-CEO of Reddit, Ellen Pao. So, while a legal victory and the financial benefit she would have realized from it eluded Pao, the social impact and dialogue she created just by bringing the case cannot be ignored.

Death Could Be Better: Physician Participation in Executions

By: Will Springer, Pitzer '15

Following the botched April 2014 execution of Clayton Lockett, a death-row inmate in Oklahoma, many third-party organizations have recommended revamping lethal injection procedures. One report developed by The Constitution Project, an organization that pairs lawmakers and legal experts to encourage policy development, argues that lethal injection policy should mandate "that qualified medical personnel are present at executions and responsible for all medically-related elements of executions." However, it is the position of the American Medical Association that members of the medical profession have no place in executions because medicine is a "profession dedicated to preserving life." This is an opinion echoed and further elaborated on by Robert D. Truog, I. Glenn Cohen, and Mark A. Rockoff who criticize The Constitution Project's report in their article "Physicians, Medical ethics, and Execution by Lethal Injection."

Truog et al. argue that physician-assisted executions fall outside the practice of medicine. Anesthetizing someone with the ultimate intention of ending life cannot be considered a medical procedure; Truog and his coauthors argue that the use of anesthetic drugs "attempt[s] to cover the procedure with a patina of respectability and compassion that is associated with the practice of medicine." They detail how The Constitution Project's report urges a medical presence at all executions regardless of ethical mandates of medical societies and licensing boards; the authors go as far as to call upon a greater number of licensing boards to revoke the licenses of those physicians who participate in executions.

Truog et al.'s argument in opposition to involving medical professionals in executions is not as straightforward as they propose. In particular, I am skeptical of their argument that, in the context of an

execution, we should not consider anesthetization a "medical procedure." To illustrate my argument, I will compare involving medical professionals in executions to physician-assisted suicide (PAS), a medical action that a significant number of physicians have historically been proponents of. I will explain what PAS is, why many medical professionals accept it, and compare and contrast it with physician-assisted executions. I will conclude that there is a serious argument for allowing physicians to participate in executions.

PAS is when a physician prescribes lethal dosages of medication with the intention of helping a patient take their own life. The patient must request this prescription and self-administer the medication. PAS is currently legal in several states, usually with the restriction that a patient must be terminally ill in order to qualify. Quill et al. explain how self-administering the medication is the primary difference between PAS and euthanasia, where the physician administers the medication that causes death, which can result in "greatly amplified power over the patient and in increased risk of error, coercion, or abuse." Many physicians consider PAS to be an ethical approach to the end of life. Snyder and Sulmasy highlight some of the arguments in favor of PAS including a physician's duty to help relieve a patient's suffering and a physician's "duty to respect patient autonomy." When Truog et al. say anesthetization for the purpose of an execution should not be thought of as a medical procedure, it is easy to interpret the term "procedure" as entering or manipulating the human body in some way through incision, endoscopy, etc. However, this is not the right way of questioning whether a physician should be able to assist with an execution. Rather, we should be asking if participating in an execution could justifiably fall under the umbrella of the medical field. From Snyder and Sulmasy's ethical arguments advocating PAS, it seems PAS falls under this category. Truog personally seems to agree that physician-assisted suicide is permissible, though he argues for a clear distinction between PAS and executions, which I will address below.

Picture the future actions of Oklahoma's Correction Department. Imagine a convicted criminal on death row who has been sentenced to an artificially induced death. This is the moriturum—defined as a person about to die. The Oklahoma Correction Department will continue to pursue executions through new means, including developing new lethal injection formulas with the assistance of compounding pharmacies, which create custom medications. These new formulas have not been used before on human subjects. Presumably, states consider the risks of implementing new execution protocol to ensure they will not be held liable for a botched execution. However, the case of Clayton Lockett shows that such considerations, assuming they occurred, are imperfect. We have no reason to believe that future lethal injections will be absent of error. Thus, in the future, there will likely be an execution where the moriturum experiences extreme pain before death. Intuitively, it seems that if the convict will be executed regardless, but involving a medical professional will reduce the potential for suffering, we would prefer the execution with a lesser chance of suffering.

Truog makes an argument for why we can hold PAS to be medically permissible but not executions, stating that:

> [T]he former [PAS] is focused upon patient-centered goals, whereas the latter [execution] serves the goals of the state… Some physicians might respond by claiming that even if participation in executions falls outside of the norms of the medical profession, their involvement should be permitted because it serves the humanitarian goal of seeking to reduce suffering… an important dimension of whether one is complicit in an act is the degree to which one shares the intentions of others who are engaged in the act… physician involvement with torture victims may be ethically justifiable when the physician does not share the intent to torture. And while administering a sedative to a prisoner before an execution may similarly be justified in terms of the sole intention to benefit the inmate, anyone who engages in the administration of lethal drugs to the prisoner necessarily shares in the intention of the state, thereby rendering the physician complicit and the act unethical.

While I agree with Truog that administering the drug that causes death may not be medically permissible, I would argue that a medical professional should be able to aid in the reduction of suffering by administering painkillers or an equivalent medication. We can evalu-

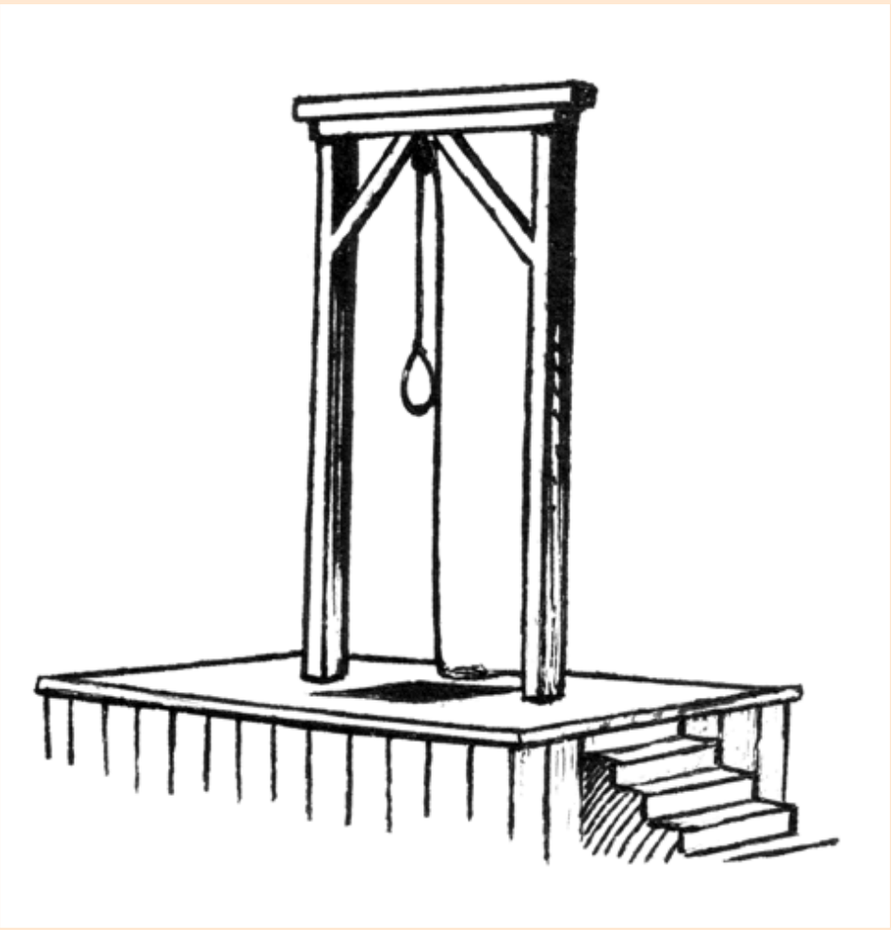
ate whether a physician is "complicit" by seeing if there is a possible contradiction between a physician's personal opinion on capital punishment and the extent of his orher participation in an execution. For example, it seems intuitively consistent that a physician can abhor capital punishment, yet administer the appropriate painkiller, resentful that he or she had to do so. Such a consistency is not so easily found in the case of the physician who coordinates and performs the execution, then condemns the action. What allows for this distinction between the medic and the executioner is that the moriturum's right to life has been taken away by the correctional system long before his or her dying breath.

Consider the following thought experiment to further support the argument that physicians can be involved in an execution in a pain-management capacity: As the moriturum is executed, he or she experiences excruciating pain. If he or she experienced this pain in any non-execution circumstances, he or she would be able to consult with a medical professional, who would be able to prescribe painkillers to decrease his or her perceived discomfort. However, during the execution, the moriturum would be unable to verbally request such medical intervention due to incapacitation from the sedative that was supposed to prevent him or her from feeling pain in the first place. In the case of future affliction, medical professionals will often prescribe medication to be used prophylactically. For example, if a patient knows he or she will be in high-anxiety circumstances for a week, the physician may prescribe a medication beforehand to help the moriturum keep calm during that period of time. Thus, the right to seek medical relief from pain is not temporally restricted. In the moment up to and during the moriturum's execution, he or she must have the right, regardless of his or her communicative capacity, to request medical intervention to relieve suffering or potential suffering. A physician, operating in a medical capacity, should honor and treat patient suffering, as in accordance with the justification for PAS. This could take the form of prescribing the moriturum a mixture of painkillers and anti-anxiety medications. The medical profession does allow for a physician to administer pain medication on a consenting individual's behalf, i.e., anesthesia. At the very least, physicians should be allowed to participate in executions if he or she is administering a medication to relieve the moriturum's pain.

One may argue that if physicians refuse to participate in executions, states may be forced via the courts to stop their capital punishment programs because of continued error. However, the Supreme Court's decision in *Baze v. Rees* establishes the need for there to be a record of error in order for protocols to be changed. In addition, these changes in protocol would likely mean a change in the drugs used as opposed to a change in execution method or the legality of capital punishment.

The more difficult question is whether to allow physicians to prepare and deliver the medications that cause death. Clearly, such action is the nonconsensual ending of one's life, which the vast majority of ethics scholars are against, notwithstanding exceptions posed by certain ethical theories. Most ethical theories would also argue that you should not kill someone, even if she

or she were to be killed otherwise by another. However, this argument is not a perfect representation of our scenario. The relevant detail to our scenario is that there is a difference in the quality of one's death based upon who ends their life, as it is presumably better for the morituram that an execution be swift and painless as opposed to prolonged and painful. We can expect that moritura would request a physician perform the execution if it would reduce the chance of a botched execution. Such a request would be of their own autonomy and the physician's involvement in the execution would be with the morituram's consent. One problem is that the physician would be the person administering the lethal medicine and not the morituram, calling to mind a comparison to euthanasia as opposed to PAS. However, the morituram is never afforded the medication necessary to take his or her own life, as he or she would have the opportunity to request from a physician under non-execution circumstances, supposing PAS was legal in their state of residence. Additionally, the previously mentioned concern regarding euthanasia, as noted by Quill et al. above, does not apply to executions because the morituram, unlike the patient requesting euthanasia, does not have the option to otherwise live out the remainder of their natural life. As mentioned previously, Truog et al. argue that the use of physicians is simply to gloss over the horrors of executions. While this may be true, as long as the physician is there at the request/consent of the morituram, for the purpose of mitigating suffering, and the physician's primary function is to operate within the realm of medicine and not for public relations, there seems to be an argument, albeit a relatively weak argument, why a physician might be able to manage and perform the execution. This argument is weak because it ignores the option that the physician could simply participate in the pain-reduction aspect of the execution, thus minimizing involvement in the capital punishment process and avoiding systematic complicity to the state.



Truog et al.'s response to The Constitution Project's report focuses on medical society ethical standards and how involving physicians gives the involuntary taking of life the façade of being more ethical. However, by the time of the execution, the morituram's right to life has already been taken away. It is now an issue of the swiftness of death and the pain of the experience, which an executioner, who is also a trained physician, can improve. By focusing on the ethical implications, I have explored the argument that physicians should be able to conduct executions at the request/consent of a morituram for the intention of eliminating or reducing the chance of a painful death. I concluded that such an argument could not withstand scrutiny. With that being said, I would argue that physicians can ethically participate in executions if their sole involvement is to administer medications to mitigate pain.

Privacy, Checks and the Imbalance of Power in the U.S.

By: Peter Ianelli, Pomona '15

In George Orwell's *1984*, two characteristics of Oceania's frightfully totalitarian rule are its control over information and its disregard for its citizens' privacy; the government is closed off to the public, determines all that the citizens can know and leaves them no solitude. Though most think that the U.S. is not subject to such a rule due to the balancing structure of its political power, the lack of a check on the judicial branch has caused to surface similar practices subversive to constitutional rule, states' rights and individuals' rights. The U.S. Foreign Intelligence Surveillance Court (a Secret Court), meant to oversee surveillance warrant requests by federal law enforcement agencies, is a prime example of this. Over the last few years it has been under constant scrutiny for judicial and public oversight. In 2011 federal judge John D. Bates reprimanded the National Security Agency for violating the 4th Amendment to the U.S. Constitution by repeatedly misleading FISC about its surveillance procedures in which it kept data through warrantless surveillance of U.S. persons. The Agency recently came under fire again when an NSA contractor leaked a top-secret warrant that demanded Verizon to provide a daily feed of all call data. Though these incidents may seem to be inadvertent oversights, upon closer examination we can see that they are, in fact, a result of a federal struc-

ture that lacks a check on the power of its judiciary.

While creating Article 3 at the constitutional convention, the founders were haunted by the memory of England's Star Chamber. This chamber, originally put in place to remedy corruption in the feudal jury system, eventually devolved into a political weapon, holding court in secret with no indictments or witnesses. Far from preventing this however, we see now that the Constitution has allowed FISC to become strikingly similar, albeit in a less aristocratic way, to the Star Chamber. For one, the court undermines the authority of state governments and the legislature through its appointment process. The Supreme Court Chief Justice appoints all of the court's judges with no confirmation or oversight by Congress. We live in a nation divided along party lines; since the formation of FISC in 1978, the last three Chief Justices have all been conservative Republicans. It is obvious that we are not giving fair consideration to both sides in the secret courts. Furthermore, the court has been deemed a "rubber stamp," with a government agent and a judge being the only two parties present at hearings and denying only 11 requests out of about 34,000 in 35 years. This combination of such biased appointment, unnecessary secrecy, and unilateral approval within the court illuminates an organization with too much centralized ability to mold the government however it wishes.

It may be argued that these appointees are not politically motivated and that, because our Chief Justices serve for life and are not subject to reelection, they have incentives less dictated by political power and more by concern for the good will of the people. The light of this claim is dimmed however by the fact that the court can justify itself constitutionally without any governmental check or appeal to the public. In July 2013, the New York Times published disclosures from government whistleblowers about a secret law written by FISC holding that the data amassed by the NSA was not in violation of the 4th Amendment to the U.S. Constitution. Such a decision greatly broadened the "special needs" exception for warrantless surveillance. In doing so, the court effectually took it upon itself to interpret the Constitution, on a matter paramount to citizens' individual rights, in a secret court, while entirely ignoring the adversarial check system so fundamental to the U.S. government. Although some see the result of this law in reality as harmless, the processes through which it came are in frightening opposition to individual civil liberties and the balance of power intended in the federal government. A supplementary court was able to make decisions upon the meaning of the Bill of Rights, in secret, through secondarily appointed justices with no check from any other part of the government.

I am aware that I am illuminating a dark spot on a government praised for its structural balance of power-- an issue optimists might say is inconsequential. However, these events show a self-perpetuating imbalance of power that has only dug itself deeper into our government in the last 200+ years since the Constitution and Bill of Rights were ratified. It may be small but it parallels a fictional society representing dystopian ideals to their fullest extent. Fundamental to the Constitution is the ideal that no single branch of government should have absolute, self-correcting power, but should be checked, an ideal clearly not being followed here and thus clearly in need of a remedy.

Democracy in the Islamic World: An Interview with Noah Feldman

Biography

Noah Feldman is the Felix Frankfurter Professor of Law at Harvard Law School where he teaches constitutional and international law. An expert on Islamic philosophy and law, he is the author of *The Fall and Rise of the Islamic State* (2008) among others. In 2003, he served as senior constitutional advisor to the Coalition Provisional Authority in Iraq and subsequently advised members of the Iraqi Governing Council on the drafting of the Transitional Administrative Law.

First off, will you tell us a little bit about your work in Iraq?

It was a hopeful time in that the United States had just gotten rid of Saddam. And when I had the chance to go, there was an aspiration both by Iraqis and also by Americans that Iraqis would be able to draft and produce a constitution that would establish basic rights and that would actually function. And I discovered very quickly on arrival in late April and early May of 2003 that the U.S.'s failure to create order on the ground in Iraq was making the topic of law almost irrelevant. The lesson that I learned then, which is kind of a Thomas Hobbes lesson, is that until you have order you can't have law. We always say "law and order" but it's really in the opposite order. The looting was a serious problem; getting rid of the military was a serious problem; the failure to establish a clear and identifiable governing structure was a serious problem. We were too influenced in some way by Locke. We believed that reasonable people could come together out of the state of nature and create a government. I think that's a very American idea, and in this case it was a very naïve idea.

As far as your ideal solution, you would have focused on first creating order and then what?

If I had been George Bush or Donald Rumsfeld, my approach would have been first to use a much larger military force than we did to secure the country and make it very clear to ordinary Iraqis that they were not in danger from their neighbors; that no one was going to walk into their home and take their stuff, which did happen frequently in the early days; and that they didn't need to join or form militias in order to protect themselves. With that larger military force it wouldn't have been necessary to eliminate the Iraqi military, or the police. Then, I would have tried to purge those forces of their most senior officers who were close to Saddam. But I wouldn't have fired everyone who ever belonged to the Baath party—many of those people didn't believe in the Baath party, they just joined it because they had no choice. I would have tried to have Iraqis govern the country on a regular ordinary basis.

Then once order had genuinely been established in that way—and it could have taken 2 months or 6 months but I don't think it would have taken much more than that—I would have begun the process of democratic elections for a representative body that could begin to draft the constitution of the country, and that would have taken a couple more years. In Tunisia where I've been doing a lot of work in the last few years, which is the only country in the Arab world where the Arab Spring has "worked," the drafting process actually took more than two years. So I think that's the amount of time that that sort of thing would have taken, and I would have kept a U.S. military presence there. But again, the day-to-day running of the country would have been done by Iraqis, not the U.S. military.

How would you identify the authorities and the experts in the culture with whom you would actually be able to collaborate in that situation?

In the initial phase you have to be very cynical and you have to figure out who has the capacity to exercise power. In the first instance that includes people who are in charge of existing institutions, the military, the police, and others who were part of the autocratic regime. In the second instance it includes leaders capable of putting people on the streets, which in Iraq's case was the Shia religious leadership who very clearly had the capacity to do that. They had to be listened to. But that would really only have been in the first initial phase. Once there are elections, you can talk to the people who have been elected.

That's a crucial inflection point. Until you have elections, you're kind of making it up and it's somewhat illegitimate from the standpoint of the people you're occupying. What you do to justify that is 1) establish order and 2) don't do anything permanent when you're dealing with people who didn't get elected. Once you have elections you have a more legitimate form of government and people can take charge of themselves and the process of constitutional design.

How do you bring democratic ideals to a country that hasn't necessarily experienced them before? How do you portray traditionally "Western" concepts of equality in a way that they are going to be able to work with, in a way that will be functional?

I think that the ideas are the easiest part. We tend to think of equality and democracy as distinctively West-

ern, but they're not anymore. There are countries all over the world that are egalitarian and democratic. India is a great example. It has its problems, like all countries do. But the basic constitutional values are those of egalitarianism and democracy. I think the same could be true in a majority Muslim country. Tunisia again is a great example. No one had to import to Tunisia the ideas of equality or democracy, they were ideas that were in the air. Once they got rid of their dictatorship that's what they put into play. No country will execute that perfectly at first, but then again we don't execute them perfectly in our own country and we've been at it for hundreds of years, slowly gradually making ourselves from a country that talked about equality but wasn't that equal to a country that talks about equality and is a lot more equal than it used to be. The same is true about democracy. Democracy itself is an evolving idea. Our founding fathers didn't like democracy, they wanted to be republicans. And we've gradually become more democratic and that's a slow painful process.

How do you transfer power in a developing Islamic democracy in a way that doesn't undermine the authority of Islam?

Within the culture, Muslim leaders will, and in many cases did, show that they were perfectly capable of talking the talk of democracy, and even walking the walk. A really good example of this is that the most important Shia religious leader in Iraq issued a fatwa in which he told the Americans that we were not being sufficiently democratic in beginning to draft the interim constitution with people who weren't elected. It was a one paragraph fatwa and it didn't even mention Islamic values, it just talked about democracy. He did that for two reasons. One, he believed it. Two, he had the votes. I think if you specify that the rules of the game are going to be democratic, people will play according to those rules. That actually happened in Iraq, it's just that order then devolved and the country became violent and lawless and the democratic impulse gave way to the strategic logic of "I must protect myself and I need a militia to do that."

What do you see the actual text of the constitutions looking like in terms of equality? Are all people, including women, equal under the law?

The new freely drafted constitutions all say that. They all have declarations to that effect. And they typically don't have reservation clauses that say "except as shall be specified by the values of Islam" or something like that. They typically on paper are strongly egalitarian. The Tunisian one is a good example of that. So I would say that is generally the trend. The Iraqi constitution is like that too.

The problem is that you can have the best guarantee in the world but if you don't have a functioning state or functioning governing institutions, it doesn't matter if you have the guarantees on the books. So in Iraq there's no problem with the Bill of Rights as it's given. The problem is the government doesn't have the capacity to enforce it and so people don't have rights.

The reverse side—how do you navigate the difficulty that arises when including an Islamic authority undermines non-religious institutions?

That's a serious problem. But so far in the countries in the Middle East where there's been relatively free elections, it hasn't happened that way. Egypt is a controversial case because secularists worried that after the Islamists got elected that the rule of religion in the society would undermine democratic values. But it's a little hard to know if that would have actually happened because, when the Islamists were trying to govern, the Constitutional Court had vacated the legislature, so there was no legislature and thus there wasn't a functioning full-on government. Then the second revolution came and suddenly there was no more democratically elected government at all. So we don't know how it would've played out. In Tunisia though, you had an Islamic Party with plurality in the government and it exercised authority, and then it lost in the elections, despite having helped a democratic constitution be erected, and it has taken a minority role with no trouble.

As far as the Arab Spring goes, how do you think the West's presuppositions caused the media to misread what would actually play out there? What underlying assumptions were people carrying that generated so much excitement about the events but turned out to be incorrect?

We were correctly excited by the fact that there were young people, primarily secular, who wanted to live better lives and that was a good thing to be excited about. The Western press tended to underplay the extent to which the military, especially in Egypt, played a crucial role in bringing down the Mubarak government. We talked about it as a revolution. It wasn't really a revolution. It was popular protests followed by the military taking advantage of the popular protest to get rid of an aging dictator. And consequently, the military didn't completely relinquish its role and eventually came back to power and that is sort of where we started there.

In other countries too, either the military acted to get rid of aging dictators or in the countries where the military stuck with the existing dictator we got war. Libya is one example and the other example is Syria. I think that the U.S., and the broader West, was right to be excited, but wrong to forget about the role of the militaries, and above all we underestimated the extent to which a war would lead to disorder and disorder would undermine the long term prospects of democracy. And that's a lesson we should not have missed, because that's what happened in Iraq. The difference is that in Iraq it was our fault and in those other countries it was not our fault.

You were hopeful 12 years ago that after the then-current war in Iraq Western governments could establish Islamic democracies. How do you feel like we have evolved along that path, especially with regard to the war on the Islamic State?

It was true in retrospect that lots of Muslims wanted to be democratic and Islamic at the same time. It was a failure of U.S. policy, I think, broadly speaking, not to realize that the transitions had to be managed much more delicately than we thought. We were influenced too much by the color revolutions in Eastern Europe when we thought everyone would go out onto the streets and everything would be fine. We didn't realize the structure of the state and the structure of society needed to be preserved in order to transform it democratically from within. And in the first round, which was the post-Iraq war round, we didn't establish order sufficiently. In the second round, post-Arab Spring, I'm not sure we could have definitively solved the problem, but there we should have backed democratically elected governments more strongly, to reduce the likelihood of the military taking over again a second time.

The point where ISIS comes in, is that, in the extreme disorder of the power vacuum that emerged in Syria after the war began there, we forgot that in a power vacuum some of the worst people will emerge. We should have known that too because, in this sense, ISIS is very similar to the Taliban. The Taliban filled the power vacuum in Afghanistan after the war with the Russians there and similarly ISIS is filling a space where no one is definitively governing. I'd say that's the lesson we really could have seen coming but didn't.

Thank you very much for your time today.

My pleasure.

For more content, please view our website at www. 5clpp.com